

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCIS FOGARTY, JR.,

Plaintiff,

-against-

**RULE 7.1 STATEMENT
OF MATERIAL FACTS**

Civil Case No.: 15-cv-01454
(GLS/DJS)

CITY OF TROY and City of Troy Police
Officers KYLE JONES and ROBERT SMITH,
both Individually and/or as agents, servants,
and/or employees of the City of Troy,

Defendants.

Defendant, Officer Robert Smith, in his individual and official capacity, by and through his attorneys, Bailey, Johnson, DeLeonardis & Peck, P.C., pursuant to Rule 7.1(a)(3) of the Local Rules of practice for the United States District Court for the Northern District of New York, hereby states the following:

THE PARTIES

1. Defendant, Officer Kyle Jones is employed as a police officer by the City of Troy Police Department [Exhibit “B”, EBT Transcript of K. Jones, p. 10].

2. Defendant, Officer Robert Smith is employed as a police officer by the City of Troy Police Department [Exhibit “C”, EBT Transcript of R. Smith, p. 6].

3. On December 23, 2012, both Officers Jones and Smith held the rank of patrolman.

4. In the early morning hours of December 23, 2012, Plaintiff Francis Fogarty was at a bar in the City of Troy called Bootleggers. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 17][Smith Aff. Ex. “1”, Incident Rpt., Control/Restrain Rpt.]

5. Plaintiff had been at the bar for an hour to two hours when his wife arrived. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 21].

6. According to Plaintiff, his wife, Sara Fogarty, arrived at the bar because she believed Plaintiff was cheating on her. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 21].

7. Plaintiff met his wife on the sidewalk outside of the bar. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 24].

8. A confrontation between Plaintiff and his wife then occurred in front of the bar. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 27][Smith Aff Ex. “1”, Statement of Sarah S. Fogarty].

9. During the confrontation, Plaintiff’s wife stated to passerby’s that she was going to get even with Plaintiff and said in sum or substance “if any of you guys want to have sex with me tonight, you can”. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 28].

10. One individual from a group offered to assist Plaintiff’s wife, to which Plaintiff responding by punching the individual. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 28] [Smith Aff Ex. “1”, Statement of Sarah S. Fogarty].

11. It was at this time that Officer Jones responded to the scene. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 28] [Smith Aff Ex. “1”, Statement of Sarah S. Fogarty].

12. Officer Jones had been stationed in his patrol car and witnessed the altercation between Plaintiff and his wife and the third unidentified citizen. [Exhibit “B”, EBT Transcript of K. Jones, pp.15-16] [Smith Aff. Ex. “1”, Incident Rpt., Control/Restrain Rpt.].

13. Officer Jones testified that Plaintiff appeared intoxicated when he approached him. [Exhibit “B”, EBT Transcript of K. Jones, p. 19].

14. Officer Jones and Plaintiff do not agree as what transpired next. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 20]; [Exhibit “B”, EBT Transcript of K. Jones, pp. 20, 26-27, 31].

15. Plaintiff testified that Officer Jones simply approached him and “whacked” him in the back of the leg and in the back with no warning. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 20].

16. Officer Jones testified that he witnessed Plaintiff have a physical altercation with both his wife and a third person. He attempted to speak with Plaintiff who was unresponsive. He then attempted to place Plaintiff under arrest for the physical altercation. [Exhibit “B”, EBT Transcript of K. Jones, pp. 20, 26-27]. Plaintiff refused to comply with commands to put his arm behind his back, elbowed Officer Jones in the face, and then Plaintiff’s wife grabbed Officer Jones from behind and Plaintiff ran. [Exhibit “B”, EBT Transcript of K. Jones, p. 31] [Smith Aff. Ex. “1”, Incident Rpt., Control/Restrain Rpt.].

17. Officer Smith was not present during the Officer Jones’ initial encounter with Plaintiff. [Smith Affidavit, ¶10.]

18. At some point, either before or after Officer Jones’ interaction with Plaintiff, Officer Jones radioed in a call that he was responding to an altercation at bootleggers. [Exhibit “B”, EBT Transcript of K. Jones, p. 33-34][Smith Aff. Ex. “1”, Supplemental Report of R. Smith].

19. Plaintiff acknowledges that he did run from Officer Jones during the initial altercation. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 34].

20. Plaintiff ran down an alleyway towards State Street. [Exhibit “A”, EBT Transcript of F. Fogarty, pp. 34-35].

21. Officer Jones made a radio call that an altercation had occurred at Bootleggers, that the suspect wearing a green jacket with grey hood fled down an alleyway towards State Street. [Exhibit “D”]

22. Upon leaving the alleyway, Plaintiff came into contact with Officer Smith. [Exhibit “C”, EBT Transcript of R. Smith, p. 7]; [Exhibit “A”, EBT Transcript of F. Fogarty, p. 35].

23. Officer Smith heard Officer Jones’ radio call and responded. [Exhibit “C”, EBT Transcript of R. Smith, p. 7] [Smith Aff. Ex. “1”, Supplemental Report of R. Smith].

24. Officer Smith observed Plaintiff, who matched Officer Jones’ description, running out of an alleyway onto State Street and ordered him to stop running. [Smith Aff. ¶ 7] [Exhibit “C”, EBT Transcript of R. Smith, p. 7] [Smith Aff. Ex. “1”, Supplemental Report of R. Smith].

25. When Plaintiff came into contact with Officer Smith he had a black object in his hand. [Exhibit “C”, EBT Transcript of R. Smith, p. 18] [Exhibit “A”, EBT Transcript of F. Fogarty, p. 39] [Smith Aff. Ex. “1”, Supplemental Report of R. Smith].

26. Officer Smith could not readily identify what the object was that Plaintiff was holding. [Exhibit “C”, EBT Transcript of R. Smith, p. 8].

27. Officer Smith ordered Plaintiff to stop running and get on the ground. [Exhibit “C”, EBT Transcript of F. Fogarty, pp. 7-10].

28. Plaintiff testified that he complied with the command and that Officer Smith then handcuffed him. [Exhibit “A”, EBT Transcript of F. Fogarty, p. 37].

29. Officer Smith testified that Plaintiff refused, that he had to force Plaintiff to the ground, and that Plaintiff resisted arrest, refusing to place his hand behind his back for handcuffing. [Exhibit “C”, EBT Transcript of R. Smith, p. 7-10] [Smith Aff. Ex. “1”, Supplemental Report of R. Smith].

30. Plaintiff does not allege that Officer Smith used force against him. [Dkt. 1, Plaintiff’s Complaint].

31. Officer Smith testified that he was kneeling next to Plaintiff attempting to get his left arm out from under his torso, when Officer Jones appeared on scene. [Exhibit “C”, EBT Transcript of R. Smith, pp. 15-17].

32. Plaintiff testified that Officer Jones came running from the alleyway and immediately struck him with his baton and kicked him in the ribs. [Exhibit “A”, EBT Transcript of R. Smith, pp. 37-38].

33. Officer Jones acknowledges that he struck Plaintiff with his baton using two quick succession motions from close range to Plaintiff’s right shoulder, upper torso. [Exhibit “B”, EBT Transcript of K. Jones, p. 52] [Smith Aff. Ex. “1”, Control/Restrain Rpt.].

34. However, Officer Jones testified that he struck Plaintiff only after he ordered him to put his hands behind his back, that Plaintiff actively refused, and Officer


Jones was attempting to gain Plaintiff's compliance. [Exhibit "B", EBT Transcript of K. Jones, p. 52] [Smith Aff. Ex. "1", Control/Restraining Rpt.].

35. Officer Smith did not know that Officer Jones was going to strike Plaintiff before he did so. [Smith Affidavit ¶10; Exhibit "C", EBT Transcript of R. Smith, p. 20].

36. Plaintiff's only allegations against Officer Smith is that he failed to timely intercede and prevent Officer Jones from using force against Plaintiff. [Dkt. 1, Plaintiff's Complaint].

Dated: February 28, 2017.

Bailey, Johnson, DeLeonardis & Peck, P.C.

By: 

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